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Current Topics.

Sir Ernest Wingate-Saul, K.C.

SIR ERNEST WINGATE WINGATE-SAUL, K.C., who died at the age of seventy-one, on 13th December, was one of the most distinguished and versatile lawyers of his time. His great talents were frequently required for the public service. Since 1928 he had been an umpire under the Unemployment Insurance Acts and in September, 1943, he was considered the most suitable person to fill the office of umpire under the Reinstatement in Civil Employment Act. His recent ruling that merchant seamen were not within the scope of the Act was upheld as legally correct by the Ministries of Labour and National Service and of War Transport, which, while paying a tribute to the courage and endurance of merchant seamen, pointed out that the Act applied only to the armed forces, while the Merchant Navy has remained a civilian service, with its own industrial organisation, and receiving civilian rates of pay. The late Sir ERNEST WINGATE-SAUL attained early recognition at the Bar after his call by the Inner Temple in 1897. He was an authority on commercial and industrial cases. In 1919 he took silk, and he became a Bencher in 1926. From 1921 to 1928 he held the offices of Recorder of Preston and Judge of the Borough Court of Pleas, and from 1925 to 1928 he was a Judge of Appeal in the High Court of Justice in the Isle of Man. He was knighted in 1933. His passing is a great loss to the public service.

The Middle Temple.

THE step recently taken by the Benchers of the Middle Temple to appoint a small committee of members of the Inn to assist in dealing with the planning and reconstruction of their devastated precincts is one which everyone interested in promoting democratic methods of government will applaud. In such matters as whether there is to be one library or two, or whether a beautiful square is to have buildings crowded upon it, it is obvious that no one has a greater interest than the young practising barrister, and his wishes should receive first priority, especially if he has returned from an arduous field of service to his country. Other Inns will possibly follow suit with this step, but it is wrong to regard it as more than a step. "Middle Templar," writing to the *Sunday Times* of 17th December, pleaded that "though the Benchers of the Inns have absolute authority, it is difficult to conceive that this authority would ever be exercised adversely to the wishes and interests of the members," Is not the answer that so long as this contingency is possible, safeguards must be devised to prevent it? The activities and decisions of the Benchers affect the professional life, and even the private lives of barristers in all sorts of ways, and those of us who are outsiders must persist in expressing surprise that a profession on the existence of which the institutions of democracy so largely depend should be governed by a method which is essentially undemocratic. "Democracy," said MASARYK, "is discussion," and it is undemocratic to make effective discussion a privilege of the few instead of a right and duty of the many.

Home Office Circulars.

No other function of the Home Secretary is so anomalous and even to some extent out of harmony with the spirit of the British Constitution as that of sending circulars to the magistrates' courts, advising magistrates on the performance of their judicial duties. It savours of just that executive interference with the course of justice which runs counter to the constitutional separation of powers. It was therefore a topic of no small importance that Sir WALDRON SMITHERS raised in the House of Commons on 7th December, when he asked the Home Secretary under what Act of Parliament or by what authority he sent circulars to justices of the peace designed to influence them in the administration of justice. At the same time Sir WAVELL WAKEFIELD asked the Secretary of State for the Home Department what was the purpose of the circular issued to magistrates in connection with the conviction of workers for infringements of laws arising from their employment. Mr. MORRISON replied that the practice was almost as old as was the Home Office itself, and derived from the constitutional position of the Home Secretary as the Minister concerned with such matters. Such circulars were often issued as the result of requests for advice from the courts. They invariably avoided giving any advice which could possibly be construed as interfering in any way with the exercise by the justices of their judicial functions in individual cases. The circular issued in April about control of employment offences such as absenteeism and persistent lateness suggested that, in the case of such offences, where the defendant was not usually of criminal character, imprisonment should, where possible, be avoided, and that increased use might with advantage be made of the procedure of adjourning to give the defendant an opportunity of thinking the matter over and complying with the law. This apologia of the Home Secretary for one of his oldest functions brings to mind the remark of a chairman of justices (recorded in "English Justice," by "Solicitor," Allan Lane, Pelican Books, p. 83) on being confronted by counsel with a recent High Court decision. "Ah," he said, "but the court which gave that decision had not had the advantage of the ruling on the point given by higher authority." His reference was to a Home Office circular!

Leases and Planning.

NEW kinds of leases will before very long be claiming the attention of lawyers. These are the documents by which local authorities will see, under the new Town and Country Planning Act, 1944, to harness private enterprise to the task of co-operating in the greatest of all enterprises, the planning of a new Britain. According to Mr. HENRY W. WELLS, War Damage and Reconstruction Areas Officer to the Ministry of Town and Country Planning, planning by lease control will first be used mostly in areas of reconstruction or redevelopment and overspill acquired under the Act, but "in course of time more and more land will be planned by acquisition and lease control." Mr. WELLS made this statement in the course of a paper which he recently read at the Town and Country Planning Summer School, before the Act was passed. The material parts of his paper were reproduced in the *Local Government Chronicle* of 9th December, 1944, and the suggestions which he made for the drawing of planning leases are of the greatest interest to lawyers. The terms of the building lease, he said, particularly the ground rent, and the conditions governing the erection and subsequent control of the building, were primarily the concern of the local authority. He did not anticipate a standard form of building lease: some authorities would prefer the detailed specification and planning of the building in the lease; others would prefer the flexible formula: "and shall erect . . . to the satisfaction of the council." Control over use, he said, can be exercised either positively or negatively, but the lease should stipulate that use cannot be changed without the local authority's consent. If the character of the neighbourhood changed, he observed, s. 84 of the Law of Property Act, 1925, gave certain rights to the lessee to have restrictive covenants removed or modified. Mr. WELLS further suggested that the lease might contain a clause providing arbitration machinery in the event of a dispute of a suggested change of use. The local authority could also control structural alterations by requiring consents to be obtained, and could also deal with amenities, rubbish disposal, smoke abatement and the control of advertisements. The most serious problem to which Mr. WELLS referred was that of controlling the assignment or sub-letting of beneficial leases at a profit. The local authority, he suggested, might stipulate that the profit which would otherwise accrue to the head lessee, should be paid to them. Once the building was erected, he said, the building lessee could, unles

prevented, sub-let at rents which did not reflect the low ground rent. It would be difficult to control this sort of profiteering. From what Mr. WELLS says it is obvious that the success or failure of the new planning will depend almost entirely on whether the lawyers concerned can draft in the building leases clauses sufficiently strict to safeguard the objects of the new law.

Post-War Local Government.

SOME interesting facts as to the Government's intentions concerning the future of local government were given by the Minister of Health, Mr. WILLINK, when he spoke at the annual conference of the Rural District Councils Association on 6th December. With regard to the first allocation of temporary houses under the Act passed on 4th October, he said that in order to obtain the maximum speed in erection many rural districts had been excluded, but there were further stages to come. In the field of permanent housing the short-term programmes he had had in from rural district councils in England and Wales comprised no less than 48,000 houses—three times the number of houses completed by rural councils in the last year before the war and not much less than a third of the total number built by rural district councils between the wars. Mr. WILLINK also referred to the Rural Water Supplies and Sewerage Act, 1944, and urged the need for planning now so that actual work may begin as soon as the Government gives the signal. Mr. WILLINK said that he would not undertake to make grants until he knew the burden of the schemes to be put on the local ratepayers, and added that waiting to see what grants would be forthcoming before preparing plans was putting the cart before the horse. It may be doubted whether this is a sound criticism of what has long been a useful guide to local authorities. Planning without any hint of what finances are likely to be forthcoming is planning in the dark. The least excuse for a Spenlow and Jorkins policy as between the central and the local authority should be severely discouraged. With regard to the Government's forthcoming White Paper, the speaker said that the Government had no proposals to make by which the position of local authorities would be weakened. The Government had no intention of retaining Regional Commissioners and their staffs in being. The organisation had been set up purely for war purposes. Nor had the Government any intention of setting up regional elected authorities to absorb any of the existing powers of the major local authorities as they now exist. The Minister said that the two methods of revising boundaries, that of periodic revision and that of a Bill in Parliament, might have undesirable results when concurrently operated. The cat which was to solve the problem must remain a little longer in its bag. But he assured his audience that the cat was not a destructive kind of animal, for they did not want destruction in the field of local government. In conclusion Mr. WILLINK said that it was the Government's firm intention to help the local government system adapt itself with the minimum of strain to the changing conditions of the world after the war. This announcement of official intentions will give some relief to those who have viewed with alarm recent encroachments on the proper functions of local authorities.

Damages for Felonies.

DURING the hearing of an action for damages for conversion of a motor car on 30th November, at the Shoreditch County Court, the plaintiff was asked by defending counsel why, having taken the matter up with the police, he had not prosecuted. After the witness had replied that the police had advised him that it was a civil matter, the learned judge observed that it was hardly likely that the witness would have heard of *Smith* v. *Selwyn* [1914] 3 K.B. 98. No objection was taken by counsel for the defendant that the action was not maintainable until after a prosecution for felony had been completed, nor could it have been useful so to object, for, on the facts, it appeared that the police advice was right, and that there had probably been no criminal intent on the part of the defendant. Oddly enough, the rule does not apply to the many misdemeanours that exist in the criminal calendar, and if any of them results in the violation of a private right causing damage, action can be brought even though no prosecution has been brought or is intended. When the Fatal Accidents Act, 1846, was passed, the rule was thought to be so harsh in the case of torts, which were also felonies resulting in death, that it was expressly abrogated by s. 1 of the Act so far as actions under that Act were concerned. Another important qualification of the rule is laid down in *Appleby* v. *Franklin* (17 Q.B.D. 93), which decided that where the plaintiff in an action for tort is not the person on whom the felony was committed (in that case, procuring abortion) the plaintiff was entitled to succeed in his action, as it was not for him but for the injured person to institute criminal proceedings. The action was the nowadays unusual action of seduction. A further important qualification was laid down in *White* v. *Spettigue*, 13 M. & W. 603, where an owner was held entitled to succeed in an action of trover against the innocent purchaser of stolen goods, although no prosecution of the thief had been undertaken. Many lawyers think that the distinction between felonies and misdemeanours is nowadays an anachronism. It could hardly, however, be abolished by a single section of a statute, for it still has many important results. For example, all those who take part in the commission of a misdemeanour are principals, but in felonies there are degrees of criminality, and, e.g., an accessory after the fact in a murder case is liable to penal servitude for life, but not to capital punishment. Again, a private person may arrest, without a warrant, a person committing or preparing to commit a felony. One of the most useful of the surviving distinctions is that where any felony has been committed, a person suffering loss or injury through the felony may be awarded up to £100 by the convicting court out of the felon's estate. This is some mitigation, at any rate, of the illogicality and harshness of the rule affecting civil actions.

Price Control of Motor Cars.

EVEN the most hard-bitten opponent of Government controls will not deny that there are times of great scarcity when the prices of particular commodities have to be controlled to prevent inflation and maldistribution. We are almost used to an enormous number of controls, many of which will have to go when peace-time production resumes its full working, There are still a number of articles, however, in which buyers and the general public complain of an undue rise in prices. One of these is second-hand cars. In a recent county court action for the return of a 1934 model car, the new price of which was in the region of £175, and which had had several owners, and had, in addition, before the date at which the value had been assessed, been left for over two years in an open yard with only two tarpaulins over it, the car was valued at £40 as at the end of 1943. It was stated in the course of the hearing that 1939 models were bringing prices of well over double their original new prices. Mr. T. LYNCH, President of the National Union of Small Shopkeepers, recently received a letter from the Minister of War Transport, giving reasons why the Minister has declined to take action in regard to cars. His strongest point appears to be that owners of laid-up cars in good condition who are now induced to sell by the prices offered, would be likely, if the price were controlled, to keep their cars for their own subsequent use. Thus the number of cars available for those who need them would cease altogether. This argument seems to assume that all those who require cars are well able to pay a price which seems to have no limit. The argument is, we submit, valid only against unreasonable control, and not control as such. More formidable are the arguments against control put forward by Mr. P. NOEL-BAKER in a recent letter to the Central Price Regulation Committee. He states that unless private sales are covered, control will be widely defeated. The initial difficulty, he says, will be to fix a proper price with due regard to varying models, ages and conditions. Both of these arguments are based on the difficulty of effecting control, but the answer, surely, is that no difficulties ought to stand in the way of something that is worth doing. In the latter case, at least, there is the precedent of second-hand furniture, which is just as subject to varieties of models, age and conditions. There seems to be no conclusive reason why an order on similar lines should not be attempted in relation to motor cars.

Recent Decisions.

In *London and North Eastern Railway Company* v. *B.A. Collieries, Ltd.*, on 8th December (*The Times*, 9th December), the House of Lords (LORD MAUGHAM, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT and LORD SIMONDS) held, reversing the decision of the Court of Appeal (THE MASTER OF THE ROLLS and MACKINNON and LUXMOORE, L.JJ.), which had reversed the decision of MORTON, J., that on the true construction of s. 15 of the Mines (Working Facilities and Support) Act, 1923, and particularly having regard to ss. 78 and 78A of the Railways Clauses Consolidation Act, 1845, as amended and therein included, account ought to be taken, in assessing the compensation payable by the defendant company to the plaintiff company under a counter-notice which had the effect of preventing the plaintiff company from working coal in a particular area, of possible contribution under s. 79A of the 1845 Act (which defines the liability of a mineowner in respect of "authorised" working of minerals) for which the plaintiff company might in the future have become liable if it had actually worked the coal "sterilised" by the counter-notice, with resulting damage to the railway and works.

In *Read* v. *J. Lyons & Co., Ltd.*, on 14th December (*The Times*, 15th October), the Court of Appeal (SCOTT, MACKINNON and DU PARCQ., L.JJ.), held, in a case in which an employee of the armaments inspection department of the Ministry of Supply, who was injured by shell explosion while she was lawfully on the defendants' premises, and the shell explosion was unexplained, but was admittedly not the result of the defendants' negligence, could not hold the defendants liable as liability only arose where the probability that harm would result ought to have been foreseen by someone who had the power to prevent it. SCOTT, L.J., added that *Rylands* v. *Fletcher* (1868), 3 L.R. H.L. 330, only applied to some interference with a proprietary right of a person, and only where something escaped from the land of another person to cause such interference.

A Conveyancer's Diary.

"Charitable or Benevolent."

In the "Diary" of 1st March, 1941, I referred briefly to *Re Diplock* [1940] Ch. 988, a decision of Farwell, J., which had just been reversed in the Court of Appeal. The appeal to the House of Lords was heard in the spring of 1944 and is now reported as *Chichester Diocesan Fund and Board of Finance (Incorporated)* v. *Simpson and Others* [1944] A.C. 341. The House of Lords, Lord Wright dissenting, dismissed the appeal. The effect of this decision is to give the authority of the House to the belief, normal before this case, that a testamentary gift to trustees upon such charitable *or* benevolent trusts as they may choose is void.

By his will the testator, who died in March, 1938, appointed executors and made certain gifts, including a gift of "the following charitable legacies," which he set out; he then gave the proceeds of sale of his residuary estate to his executors, directing them "to apply the residue for such charitable institution or institutions or other charitable or benevolent object or objects as my acting executors or executor may in their or his absolute discretion select." The will was proved in May, 1938, and the executors forthwith distributed the proceeds of sale of the residuary estate, which exceeded a quarter of a million pounds, among almost 140 charitable and benevolent objects, including the appellants. "After the estate had been distributed," said Lord Simonds, "the validity of the residuary bequest and the propriety of the distribution were challenged by certain persons who had fortuitously discovered a possible flaw in the will, and claimed to be some of the next of kin of the testator." The executors took out an originating summons in June, 1940, for the determination of the single question whether the trust of residue was a valid charitable trust or was void for uncertainty or otherwise. Farwell, J., held that it was valid; the Court of Appeal held that it was void, and the House of Lords upheld their decision.

There is, of course, no doubt that a testator must exercise his testamentary power himself and cannot delegate it to his executors or to anyone else. To this rule there is the exception that if he indicates a desire that the estate shall be applied for charitable purposes, the court will execute the charitable trust, "For the court knows what is charitable by reference to the Statute of Elizabeth, to the objects there enumerated and all others which 'by analogies are deemed within its spirit and intendment'" (*per* Lord Simonds, at p. 371). His lordship said that it is possible that the exception was originally established on some broader ground of favour to charity. But there the exception stops. As regards the particular class of "benevolent" objects, "what is benevolent the court knows not": *ibid.* If, therefore, the gift is not one the whole of which must be applied to charity, the whole gift is void as not falling within the exception. On those grounds the House held the present disposition void because, as a matter of construction, the executors were given a right to apply the residue to "benevolent" objects, charitable or not, just as much as to charitable ones. The field open to them extended beyond the charities in favour of which there is an exception to the general rule against the delegation of testamentary power.

The question in issue in the House of Lords, and indeed below, was whether the presence of the particle "or" between "charitable" and "benevolent" did, as a matter of construction of the will, give to the executors a range of choice larger than the class of charities. Strictly, it was not in issue and has not been held, that the presence of this particle *necessarily* has such an effect; but in practice it is going to be very difficult in future to find contexts which will support a different construction, because the true construction in the present case stands directly on the crucial words themselves without any assistance whatever from context (and, though they are not admissible, sympathy and inclination in the case militated against the decision that was reached.)

Farwell, J., was persuaded that "charitable or benevolent" did not import a true alternative, so that they were not more, but less, extensive than "charitable." He held that there was an overriding charitable intention and that the words "or benevolent" were controlled thereby. Thus the executors' choice of charities were limited to such as were also benevolent. This piece of reasoning was stated in the appellate tribunals to do violence to the language, since it at best ignored the word "or," and treated the phrase as if it were "charitable benevolent"; alternatively, it involved substituting "and" for "or," and making the phrase "charitable and benevolent," an expression which, on the authorities, is plainly valid.

In the Court of Appeal, the respondent introduced a fresh point, arguing that in this will the "or" was not a true disjunctive, but that it merely connected "charitable" with "benevolent," the words being used in this will as synonymous. He contended that words change their meaning, and that the court was not bound to put the same construction on "benevolent" as had been put on it in 1837, when Lord Cottenham had said that it was not co-extensive with "charitable"; by 1940 the word colloquially connoted the relief of poverty or distress, objects within the legal concept of charity. The Master of the Rolls refused to accept this reasoning, citing authorities much more recent than 1837 for the view that the two words do not have the same meaning, and that "'benevolent' in some respects covers less ground than the word 'charitable' and in other respects covers more" ([1941] Ch. 253, at p. 262). Clauson and Goddard L.JJ., delivered short judgments concurring with the Master of the Rolls, but Goddard, L.J. (pp. 266–267) expressed his lack of enthusiasm: "When I find a rule which says that if property is left to trustees to give to charitable and benevolent purposes, that is good, but if it is for charitable or benevolent purposes, it is not, I regard it with some distaste. . . . (It is) a trap into which the unskilled draftsman not infrequently falls . . . It is obvious that Mr. Diplock's intention was to leave the money to charity in the popular sense of the term, and had it been pointed out to him when he said 'I want to leave it to charitable or benevolent objects,' 'Well, if you use those words the money will not go to charity, but to your first cousins once removed' (of whose existence he himself probably did not know) . . . he would have said 'Cut out the word benevolent.'"

By the time the case reached the House of Lords someone had discovered the really startling fact that in Scotland, where the rule that the testamentary power is incapable of delegation is as well settled as it is in England, the courts have held more than once that a gift for charitable or benevolent purposes is valid, the word "or" being used "not as separating distinct and contrasted classes of property, but rather as an exegetical link between convertible and equivalent synonyms" (*per* Lord Macmillan [1944] A.C., at p. 351). Thus, as the Lord Chancellor put it, one could speak of "the House of Lords or the Upper Chamber," the particle's use there being quite different from its use in the phrase "the House of Lords or the House of Commons" (p. 349); or, as Lord Wright put it, "a gift of pigs or cows would clearly present an alternative . . . but a disposition in favour of dishonest or unprincipled men would not present a true alternative, though it might on other grounds be void for uncertainty" (p. 363). The trouble about this line of argument was succinctly stated by Lord Simonds (at p. 369): "Undoubtedly 'or' is capable of this (exegetical) meaning. So used, it is equivalent to 'alias' or 'otherwise called.' The dictionary examples of this use will generally be found to be topographical, as 'Papua or New Guinea,' but, my lords, this use of the word 'or' is only possible if the words or phrases which it joins connote the same thing and are interchangeable the one with the other," which simply is not the case with "charitable" and "benevolent" even in ordinary parlance let alone in a document where "charitable" is presumed to have the artificial technical meaning which has become annexed to it in English law.

The text-book rule and the "trap" (so described by Goddard, L.J., quoting an earlier comment by the Master of the Rolls) are thus established in English law with the authority of the supreme tribunal. It is very difficult to see what other result was possible having regard to the state of the English authorities, which included previous *dicta* in the House of Lords itself to the same effect apart from a substantial body of other authority. As Lord Macmillan said (p. 351): "it is somewhat disconcerting" to find that the Court of Session has on several occasions "taken a different view in construing words very similar to those now under consideration by this House." But the real doubt which seems to emerge is whether the Scottish cases were correctly decided. The question of Scots law was not before the House and no opinion was expressed upon it. But if I were qualified to have a view on the law of Scotland I could not but wonder what would happen if an identical Scottish case ever reached the House of Lords; the existing Scottish authorities are apparently not decisions of the House, and in any event it is difficult to resist the proposition of Lord Simonds, cited above, that the exegetical use of "or" must link synonyms. The explanation may be, as suggested by Lord Macmillan (at p. 351), that "in Scotland the term 'charitable' has in law a less rigidly technical and artificial meaning than in England." But, for all that, *Chichester Diocesan Fund* v. *Simpson*, while it settles the English law, almost must unsettle that of Scotland.

As I said, it is difficult to see how this case could have been decided otherwise. But it is impossible to feel satisfied that the law thus expounded is just or even reasonable. The root of the trouble is the technical and artificial meanings given by the English courts to the word "charity" and "charitable," meanings no more nearly related to the ordinary use of the English language than was the so-called "technical use of the word 'money'" before the recent decision of the House of Lords in *Perrin* v. *Morgan*. Lord Wright said in *Chichester Diocesan Fund* v. *Simpson* (at p. 353), that "I confess I am convinced that the time has come when modern minds imbued with modern ideas should attempt to achieve a clear, workable and comprehensive definition of what is meant by charitable and its cognate terms such as benevolent, philanthropic, and the like. That is a task for the Legislature." With this observation I respectfully agree. As matters now stand, the practitioner who has to advise on these matters is not dealing with an ordinary living word in a living language, but with a word which is in popular use and has a popular meaning but which the courts treat at the same time as a term of art. If the meaning now ascribed to "charity" (which is made up of glosses upon the preamble to

the Elizabethan statute) were annexed to a Latin word or to an otherwise meaningless word, little harm would be done. But the trouble begins when the artificial meaning is attached to a word which testators can and do use in all innocence in its popular sense. It is very difficult indeed to see on what ground it is for the public benefit that there should be the existing complexities and arid learning as to the meaning of "charity"; and when that learning leads to a situation in which a quarter of a million pounds is diverted from objects which everyone knows perfectly well would have been approved by the testator to some distant relatives of whose existence, according to Goddard, L.J., the testator probably did not know, it is difficult to see a reasonable answer to the charge of word-chopping. Respect for the law must ultimately rest upon the understanding and goodwill of the reasonable citizen, and it is the strength of our law that it is a native growth which does to a large extent command that understanding and goodwill. In the matter here discussed a change in the law seems necessary; legislation is obviously not easy and a preliminary expert inquiry would be essential. Such would be a suitable task for the Law Revision Committee which, unhappily, has not issued reports of late.

Landlord and Tenant Notebook.

"Has become Landlord by purchasing the Property."

THE above words occur in para. (*h*) of Sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, i.e., in the set of provisions entitling courts to make orders for possession of controlled premises without proof of the availability of suitable alternative accommodation. As applied by the Rent, etc., Restrictions Act, 1939, to "new control" cases, the enactment runs: "A court shall . . . have power to make or give an order for judgment for the recovery of possession . . . if . . . (*h*) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after September 1, 1937) for occupation as a residence for (*i*) himself . . . " etc.

Interpretation of the words "has become landlord by purchasing the property" was called for in the recent county court case of *Sams* v. *Watson*, reported in the *Estates Gazette* of 25th November, 1944 (p. 493); and a correspondent has kindly given me the very different facts of another county court case in which a similar point would, but for the ruling that a notice to quit was bad, have been raised.

In *Sams* v. *Watson* it appeared that the plaintiff landlord was in negotiation for the house he claimed in August, 1939, and on the last day of that month paid the usual deposit. It was then occupied by a tenant who, pursuant to an agreement made with the vendor, left on 4th September, without having paid or become liable to pay any rent to the plaintiff. Completion took place on 10th September, 1939: the plaintiff moved in, let the house in 1943, and now wanted it for his own occupation.

The learned county court judge found in his favour, rejecting some of the arguments put forward in his favour, accepting others, and rejecting that advanced on behalf of the defendant.

Dealing with the last-mentioned first: the contention was that "landlord" bore the popular meaning of "owner." Support was found for this proposition in the interpretation section: s. 12 (1) (*g*) of the Increase of Rent, etc., Act said that "landlord" *also* includes in relation to any dwelling- house any person, other than the tenant, who is or who would but for this Act be entitled to possession of the dwelling-house; and no doubt the *Lloyd* v. *Cook* [1929] 1 K.B. 103 (C.A.) group of cases was cited, in which the Court of Appeal decided, almost in desperation, that "landlord" did not imply the existence of a tenancy. But that was for the purposes of s. 2 (1) of the Rent, etc., Restrictions Act, 1923, i.e., for the purposes of decontrol, it being held that a freeholder who had never let a house might be its landlord.

The arguments advanced for the plaintiff included one that he had become purchaser before 1st September, 1939, by virtue of the contract of sale. The learned county court judge agreed that he had obtained certain equitable rights, and would be a "purchaser" within the meaning of V.P.A., 1874, as replaced by L.P.A., 1925; but pointed out that what the paragraph with which he was dealing required was that the plaintiff should not *become landlord by purchasing*, and it was on the ground that the relationship had not resulted from the purchase that he decided the issue in the plaintiff's favour. The sequence of events is as important as the meaning of "purchase."

At the end of last year the Court of Appeal had occasion, in *Bryanston Property Co., Ltd.* v. *Edwards* (1943), 87 SOL. J. 439 (C.A.), to observe that in interpreting the Increase of Rent, etc., Restrictions Acts too much attention should not be paid to technical argument (see 87 SOL. J. 436). (True, this observation was itself too liberally interpreted by the tenant in *White* v. *Richmond Court, Ltd.* (1944), 60 T.L.R. 391 (C.A.), but that is another story (see 88 SOL. J. 302)). In this case I respectfully suggest that the learned county court judge rightly acted on this principle. The paragraph uses the word "purchase," but that the framers can hardly have had V.P.A., 1874, in mind is shown by what follows: "the dwelling-house," not "the reversion immediately expectant on," etc., etc. In fact, they were legislating for a situation which those who have had any experience as Poor Man's Lawyers will recognise as "selling over the tenant's head": an unjustifiable grievance usually results, but in this case, as the learned judge pointed out, using indeed the same metaphor, the object is to prevent a person who purchases a dwelling-house over the head of the sitting tenant from taking advantage of the section against that tenant or his successors.

A vivid contrast can, in fact, be drawn between the position reviewed in the *Lloyd* v. *Cook* cases and that obtaining when a defendant is, in effect, objecting to jurisdiction in recovery of possession. In the latter case, the statute contemplates litigation in which the plaintiff claims a remedy because he wants the premises for his own occupation, etc.; his adversary turns round and says "Yes, but how did you become my landlord?" and if the answer is "By purchase," the plaintiff is out of court; but not if he purchased first and then became landlord, even if the purchase were after 1st September, 1939.

The facts of the other county court case, in which the issue was left undecided, were that a mesne landlord of controlled premises, whose three years' lease expired after 1st September, 1939, held over, the sub-tenant (whose original tenancy was for a year certain) having already held over. He then wanted possession for his own occupation. Could his tenant have successfully maintained that the mesne landlord had purchased since 1st September, 1939; and if holding over does not constitute purchase, would the exercise of an option for a new lease have that effect?

It will be observed that in such circumstances the (sub) tenant could point out that if there had been no extension or renewal, he would have become the direct protected tenant of the sometime superior landlord, by virtue of s. 15 (3) of the Increase of Rent, etc., Act, 1920. Consequently, though his landlord might argue that a relationship of landlord and tenant had existed between them before that extension or renewal, I think that, having regard to the object of the legislation "has become landlord by purchasing the dwelling-house *or any interest therein*," would be read as referring to the relationship determined as a condition precedent to the action. Thus, the answer that the house had been purchased over the defendant's head would be a valid one, he having been the sitting tenant when the deal was done. The aim is to protect such tenants against anyone who did not let to them unless the plaintiff has inherited the property, and I think that the protection would extend to a case in which the plaintiff's title originated in the bankruptcy or lunacy of the original landlord, whether such bankruptcy or lunacy resulted from the Increase of Rent, etc., Restrictions Acts or not.

To-day and Yesterday.

LEGAL CALENDAR.

December 18.—On the 18th December, 1747, "Aeneas Macdonald was brought to the bar at the Court House, Southwark, and the Attorney-General having moved that sentence might be pronounced against him, he delivered a paper into court desiring that it might be read (which was done) declaring that he used no subterfuge on his trial, that his witnesses were men of credit, who proved him to be in France many years, that he was sent out of the country without his knowledge and, if he had acted against the laws of it, it was through ignorance. Then Lord Chief Justice Lee pronounced sentence of death." Macdonald had gone to France at the age of about nine and had spent most of his life there, becoming a banker. He moved in Jacobite circles and became known as "the Pretender's banker." During Prince Charlie's rising he went to Scotland, and after Culloden he was captured. Though condemned to death, he was reprieved and released two years later.

December 19.—On the 19th December, 1733, thirteen criminals were executed at Tyburn, among them a murderer and several robbers and burglars. John Brown and Elizabeth Wright were condemned for coining. They were drawn to the place of execution on a sledge, the man being hanged and afterwards slashed across the body and the woman chained to a stake, strangled and burnt.

December 20.—Sir Andrew Slanning, a wealthy and good natured baronet, picked up with an orange girl at Drury Lane Theatre, and after the performance they went out together. Some other gentlemen followed in a jocular spirit and one, Mr. John Cowland, put his arm round her neck. Sir Andrew bade him desist, saying she was his wife, but Cowland, knowing him to be married to a lady of his own rank, gave him the lie and swords were drawn. The gentlemen present intervened and, an apparent reconciliation having been effected, they proceeded to the Rose Tavern, but as they were going upstairs Cowland drew his sword again and stabbed Sir Andrew fatally in the belly. He was convicted of murder, condemned to death and, despite great efforts to obtain a pardon, hanged at Tyburn on the 20th December, 1700.

December 21.—Nathaniel Hawes, apprenticed to a London upholsterer, early took to robbing his master, was convicted at the Old Bailey of stealing goods to the value of 39s, and sentenced

to transportation. This punishment, however, he escaped by denouncing the man who had received the property he stole and turning King's evidence on his trial. In Newgate he fell into the worst possible company and as a result joined one of the gangs of the great Jonathan Wild, the king of the underworld, executing several successful robberies in partnership with a fellow named James. After a quarrel over the division of the spoils they parted company and eventually Hawes denounced him and gave evidence on which he was convicted and hanged. He himself was sentenced to a term of imprisonment in the New Prison because in Newgate his life would have been in danger from the vengeance of his fellow criminals. Soon afterwards he and another man broke out of gaol and went into partnership as highwayman, but their connection was broken by a dispute over their shares of the takings. Eventually he was caught on Finchley Common while holding up a gentleman who succeeded in snatching his pistol from his hand. At the Old Bailey he refused to plead saying: "The people who apprehended me seized a suit of fine clothes which I intended to have gone to the gallows in; and unless they are returned, I will not plead, for no one shall say that I was hanged in a dirty shirt and ragged coat." Consequently, he was ordered to be pressed to death, but after he had borne 250 lbs. weight for about seven minutes he changed his mind, pleaded not guilty, and was convicted. He was hanged at Tyburn on the 21st December, 1721, at the age of twenty.

December 22.—When Moll Hawkins got tired of the trade of button making she went on what the underworld called the "question lay." She dressed as a smart shop girl, took an empty bandbox in her hand and, passing as a milliner's or sempstress's apprentice, she would go early to the house of a lady of quality, saying she had brought the goods ordered the day before. The servant would show her in and go upstairs to announce her and she would make off with such plate as she could lay hands on. After this she took to shoplifting, but she was caught, and on the 22nd December, 1703, she was hanged at Tyburn, at the age of twenty-six for stealing from a shop in Paternoster Row.

December 23.—Will Lowther was born at Whitehaven, in Cumberland, and bred at Newcastle-on-Tyne. His father gave him a small collier in which he traded with London but there he fell into bad company, lost his little vessel one night at play and took to the "water pad" or robbing ships at anchor in the Thames. He never again rose out of the underworld and finally went into partnership with another criminal, called Dick Keele. They were imprisoned together in Clerkenwell Bridewell and started a riot, in which Edward Perry, a servant of the keeper, was killed. They were condemned to death and hanged on Clerkenwell Green on the 23rd December, 1713. Lowther was twenty-three years old.

December 24.—On the 24th December, 1764, "the peace officers for the city and liberty of Westminster made a general search for beggars and other vagabonds and the same evening carried several, whom they had apprehended to the sitting justices, where they were dealt with according to law."

INTERRUPTIONS.

Lord Greene's recent criticism of one of the Divorce Division judges for over-interrupting counsel, was unusual, but so, perhaps, was the total of more than 2,900 questions from the bench though judicial interposition is no new phenomenon. "My friend's opening is already obsecure; with your lordship's interruptions it becomes unintelligible," Sir John Rigby, afterwards a Lord Justice of Appeal, once said to a Chancery judge, and once, while a question of "molesting" was being argued in the House of Lords, counsel was so frequently interrupted by one of the Law Lords that Lord Morris at last observed: "I think the House quite understands now the meaning of 'molesting a man in his business.'" When Ignatius O'Brien was Lord Chancellor of Ireland and sat in the Court of Appeal with Lord Justice Ronan, their interruptions reached such a pitch that more than once deputations from the Bar approached them with warnings that the day was approaching when counsel would refuse to appear there. Once Tim Healy actually walked out of the court in protest. "All day long," he said, "I have been trying to utter two consecutive sentences without interruption and I have failed. It's impossible to conduct an intelligent argument in this court." He tied up his papers, threw them down and turned away. From the bench came the penitent plea: "Mr. Healy! Mr. Healy! I'll not say another word if you'll come back." "I will not," said Tim, and went out. More delicate was Serjeant Matheson who, having stood silent for over half an hour while the judges wrangled, said suavely: "If I might venture to interrupt your lordships for a moment."

The Queen visited the Middle Temple on the 12th December to take her seat at the high table as the first woman Bencher of the Inn. After the ceremony she dined with the Treasurer, Serjeant Sullivan, K.C., and the other Masters of the Bench. Though the Queen is the first woman Bencher of the Middle Temple, she is not the first woman Bencher. Queen Mary became a Bencher of Lincoln's Inn last year. Four hundred years ago Queen Elizabeth was a frequent visitor to the Middle Temple, but she was not a Bencher.

Obituary.

SIR ERNEST WINGATE-SAUL, K.C.

Sir Ernest Wingate-Saul, K.C., died on Wednesday, 13th December. An appreciation appears at p. 425 of this issue.

MR. W. K. MINSHALL.

Mr. William Kenrick Minshall, solicitor, of Oswestry, died on Tuesday, 12th December. He was admitted in 1894.

MR. G. F. SUTTON.

Mr. George Frederick Sutton, M.A., F.S.A., solicitor and Clerk to the Worshipful Company of Leathersellers, died on Wednesday, 13th December, aged seventy-six. He was admitted in 1894.

MR. I. H. SWALLOW.

Mr. Isaac Harrinson Swallow, B.A., solicitor, of Messrs. I. H. and F. B. Swallow, solicitors, of Carey Street, W.C.2, died on Wednesday, 13th December. He was admitted in 1897.

Parliamentary News.

HOUSE OF LORDS.

Expiring Laws Continuance Bill [H.C.].
Read First Time. [13th December.

Road Transport Lighting (Cycles) Bill [H.L.].
To make obligatory the carrying by bicycles and tricycles not propelled by mechanical means of rear lamps, red reflectors and white surfaces during the hours of darkness, and to relax temporarily as respects such vehicles when stationary owing to the emergencies of the traffic or in order to comply with any traffic signal or direction the obligation to show lights.
Read First Time. [13th December.

HOUSE OF COMMONS.

Consolidated Fund (No. 1) Bill [H.C.].
To apply a sum out of the Consolidated Fund to the service of the year ending on the 31st March, 1945.
Read First Time. [15th December.

Licensing Planning (Temporary Provisions) Bill [H.C.].
To make temporary provision as to justices' licences in war-damaged areas and certain areas related to war-damage areas.
Read First Time. [15th December.

Local Elections and Register of Electors (Temporary Provisions) Bill [H.C.].
Read Third Time. [15th December.

London Midland and Scottish Railway (Canals) Bill [H.L.] (Suspended Bill).
Read Third Time. [14th December.

London Midland and Scottish Railway Bill [H.L.] (Suspended Bill).
Read Third Time. [14th December.

Representation of the People Bill [H.C.].
To amend the law relating to parliamentary and local government franchises, and the registration of parliamentary and local government electors, to provide for the resumption of local elections, and otherwise to amend the law relating to parliamentary and local government elections, including the redistribution of seats at parliamentary elections.
Read First Time. [13th December.

QUESTIONS TO MINISTERS.

COMMITTEE ON RENT CONTROL.

Mr. BUTCHER asked the Minister of Health when it is anticipated that the Report from the Committee on Rent Control will be received.

Mr. WILLINK: I understand that the Committee hope to report next February. [14th December.

REINSTATEMENT IN CIVIL EMPLOYMENT.

Mr. KIRBY asked the Minister of Labour whether he appreciates that workpeople who successfully appeal under the Reinstatement in Civil Employment Act, 1944, cannot be granted legal costs by the committee before whom they appear and, as this adds to the hardship of those whose reinstatement has been delayed, if he will introduce legislation to remedy the position.

Mr. BEVIN: Neither a worker nor his former employer is entitled to be awarded the cost of being legally represented before a Reinstatement Committee or the Umpire, but this does not seem to me to give rise to any particular hardship. Neither party need be legally represented on these occasions unless he chooses to do so. On the contrary, he is expressly empowered to conduct his own case or to be represented by his trade union or employers' organisation or by a relative or personal friend or, in the case of an employer, by a director, partner, manager or any member of his staff. In these circumstances I am unable to agree that further legislation is called for. [14th December.

LEGAL AID IN SCOTLAND.

Mr. BUCHANAN asked the Secretary of State for Scotland if he is aware that a committee has been set up in England to inquire into the question of legal aid; and if he proposes to set up a similar committee for Scotland.

Mr. JOHNSTON: The answer to the first part of the question is in the affirmative. As regards the second part, a committee inquired into this subject in Scotland in 1937, but it was not found practicable at that time to take action upon their recommendations. During the past two years the Lord Advocate and I have been endeavouring to find means for improving the existing scheme without legislation, but this has not so far been found possible. We propose, however, to give further consideration to the position in Scotland, when the Report of the Committee now sitting in England has been received. [14th December.

Notes of Cases.

COURT OF APPEAL.

Bean (Inspector of Taxes) *v.* Doncaster Amalgamated Collieries, Ltd.

Scott and du Parcq, L.JJ., and Uthwatt, J. 26th July, 1944.

Revenue—Income Tax—Mineowners—Drainage works—Obligation of mineowners to safeguard drainage works from damage through subsidence—Periodical expenditure necessary in the past in fulfilling obligation—Payment of lump sum by instalments as contribution to drainage scheme which would have effect of removing obligation—If no drainage scheme effected substantial capital expenditure necessary if particular coal faces continued to be worked—Whether payment towards contribution capital or revenue expenditure—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sched. D, Case* 1—*Doncaster Area Drainage Act*, 1929 (19 & 20 *Geo.* 5, *c. XVII*), *s.* 9 (1).

Appeal from the judgment of Macnaghten, J.

This was an appeal by the Crown from the decision of Macnaghten, J., who confirmed the decision of the General Commissioners for Doncaster that certain instalments of a lump sum payable by the D Company as a contribution to the Don Improvement Scheme were deductible as a revenue expense. By s. 9 (1) of the Doncaster Area Drainage Act, 1929, it was the duty of mineowners in the Doncaster district to keep in repair the drainage system in the district which might suffer loss of efficiency by reason of any subsidence resulting from the working of the mine. By the year 1937 the company had carried their coal faces to a distance of not more than 600 yards from an important watercourse known as the Mill Brook, where there were drainage works in respect of which the company had periodically expended money in order to fulfil their obligations, and it was then found that the company could not proceed further without endangering these drainage works unless they carried out extensive remedial works at an estimated cost of £68,000. The company then accepted a proposal from the drainage board set up under the Act, of a joint scheme of extensive drainage works to be carried out, over a wide area, which would have the effect of making the Mill Brook drainage works no longer necessary, the company agreeing to contribute the sum of £39,000, to be paid by half-yearly instalments over a period of thirty years, each instalment including interest amounting to £1,088 5s. The company contended that the £39,000, plus interest, took the place of the periodical sums they had to expend in the past, and therefore each instalment was a revenue expense deductible by them in arriving at their profits of the particular year of payment. The Crown contended that the £39,000 and interest was payable by the company in order to escape the liability of expending the £68,000 which they would have had to expend on the remedial works if they had not entered into the joint scheme, and consequently the payment of the £39,000 and interest was a capital expenditure, for the expenditure of the £68,000 would have been of a capital nature. Macnaghten, J., held, following the observations of Rowlatt, J., in *Anglo-Russian Oil Company, Ltd.* v. *Dale* [1932] 1 K.B. 124, that the money payable by the company got rid of an annual expense, and, therefore, was deductible by the company as a revenue expense. The Crown appealed.

Scott, L.J., said that the expenditure of the money in question procured for the company two enduring advantages, namely (1) a large new acquisition of coal, which could not otherwise have been worked except by the capital expenditure of £68,000; (2) a permanent immunity from all continuing expenditure which otherwise would result from the fulfilment of the obligations of the Act. Therefore the expenditure was of a capital nature. Furthermore, the Commissioners found such facts as compelled the court as a matter of law to say that the expenditure was a capital one. The appeal, therefore, would be allowed.

du Parcq, L.J., and Uthwatt, J., gave judgments to the same effect. Appeal allowed.

Counsel: *The Solicitor-General* (Sir David Maxwell Fyfe, K.C.), and *R. P. Hills*; *Heyworth Talbot*.

Solicitors: *Solicitor of Inland Revenue*; *Bird & Bird*, for *C. M. H. Glover*, Doncaster.

[Reported by J. H. G. Buller, Esq., Barrister-at-Law.]

CHANCERY DIVISION.

In re Cohen.

Uthwatt, J. 27th June, 1944.

Conflict of laws—Domicile—Will—German testatrix—Legatee and testatrix killed together—No evidence as to survivorship—Law applicable—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 184.

Adjourned summons.

The testatrix, a German national domiciled in Germany, made a joint will dated 10th April, 1918, with her husband, who predeceased her. By that will she gave all her estate to her children in equal shares. On 14th October, 1940, the testatrix and her daughter, O, were killed in an air raid in London in circumstances in which it was impossible to say which died first. The testatrix was survived by two other daughters. Administration with a translation of the will was granted to the Public Trustee. By this summons he asked whether the succession to the moveables of the testatrix was governed by the law of England or of Germany. Under the Law of Property Act, 1925, s. 184, where two persons die in circumstances rendering it uncertain which survived the other, such deaths, for all purposes affecting the title to property, are presumed to have occurred in order of seniority. The German Civil Code, art. 20, provides: "If it cannot be proved that of several deceased persons declared dead one has survived the other, it is presumed that they have died simultaneously."

Uthwatt, J., said that under German law O could benefit under the will of the testatrix only if she survived the testatrix. It was argued on behalf of the persons interested in her estate that, in ascertaining whether O survived the testatrix or not, the method of proof was determined by the *lex fori*, and that, once it was shown that it was uncertain which of them survived the other, s. 184 applied as part of the *lex fori*, compelling the court to draw the inference that O survived the testatrix, and it was only then that one turned to the law of the domicile. This argument was not well founded. The law of the domicile was alone relevant in determining the effect of the testamentary dispositions of moveables made by the testatrix. The question of survivorship was raised by the provisions of the German law of inheritance, the question being whether the administration of the estate was to proceed on the footing that O survived the testatrix or on the footing that she did not. The method of proving any fact bearing on survivorship was determined by the *lex fori*. The effect of the fact so proved was determined by the law of the domicile. The fact proved was that it was impossible to say who was the survivor. Section 184 did not come into the picture, as the section was not part of the law of evidence of the *lex fori*. It contained a rule of substantive law, directing a certain presumption to be made in all cases affecting the title to property. As a rule of substantive law, the section was relevant when title was governed by the law of England. It had no application when title was determined by the law of any other country. In his opinion the provisions in art. 20 of the German Civil Code was part of the substantive law of Germany and not part of the law of its evidence. That rule of law had to be applied. Predicating that O was presumed to have died simultaneously with the testatrix, it was clear she was not a person living at the time when the succession to the estate of the testatrix opened, and accordingly, under the law of Germany the other two daughters of the testatrix took her moveable estate.

Counsel: *Donald Cohen*; *Danckwerts*; *Lightman*; *Fawell*.

Solicitors: *Rubenstein, Nash & Co.*; *Broad & Son*; *Solicitor to the Custodian of Enemy Property*.

[Reported by Miss B. A. Bicknell, Barrister-at-Law.]

War Legislation.

Statutory Rules and Orders, 1944.

E.P. 1371. **Defence.** Order in Council, Dec. 8, amending reg. 45 of the Defence (General) Regulations, 1939.

E.P. 1370. **Discharge Lamp Lighting** (Revocation) Order, Dec. 9.

E.P. 1361. **Lighting** (Restrictions) (No. 4) (Northern Ireland) Order, Dec. 7.

E.P. 1360. Lighting (Restrictions) (No. 4) Order, Dec. 7.

No. 1341. **Vaccination** Regulations, Dec. 1.

No. 1345. **War Damage** (Business Scheme) (Extension of Insurance and Premium) (No. 2) Order, Dec. 6.

Notes and News.

Honours and Appointments.

The President of the Board of Trade has appointed Sir Edward Tindal Atkinson to be Chairman of the Central Price Regulation Committee, in succession to the late Mr. J. H. Thorpe, K.C., and Mr. John Busse to be Vice-Chairman of the Committee on relinquishing the post of secretary, which he has held for the last three years.

Mr. Harold S. Haslam, Deputy Clerk and Solicitor to the Shipley U.D.C., has been appointed Clerk to the Council. He was admitted in 1936, and succeeds Mr. H. Barnes, who is retiring on 31st December, on account of ill-health.

Mr. H. N. Harrington has been appointed Solicitor to the Board of Customs and Excise in place of Sir Alfred Brown, who has been appointed to the Legal Division of the Control Commission for Germany (British Element).

Mr. Arthur Morley, K.C., has been appointed Deputy Chairman of the Court of Quarter Sessions of the County of Middlesex. Mr. Morley was called by the Middle Temple in 1913, and took silk in 1933.

Mr. Charles Archer Marsh has been appointed Deputy Town Clerk of Manchester. He was admitted in 1934 and has been senior assistant to Manchester Corporation since 1938.

Mr. J. S. Atherton, an Administrative Assistant in the Wembley Town Clerk's Department, has been appointed an Assistant Prosecuting Solicitor to the London County Council.

Mr. Donald George Rogers, Acting Deputy Town Clerk of Chester since August last year, has been appointed Assistant Solicitor to the Gloucestershire County Council. Mr. Rogers was admitted in 1937.

Notes.

We are pleased to learn from Mr. R. H. Penley, solicitor, of Messrs. Penley and Milward, solicitors, of Dursley, Glos., that Capt. F. C. Penley, a prisoner-of-war in Germany, has passed his Solicitors' Final Examination.

The Town Clerk of Carlisle (Mr. F. G. Webster, O.B.E.) will retire on the 31st March next, when he will have completed almost forty-four years' local government service. The Carlisle City Council, at their last meeting, appointed Mr. H. D. A. Robertson, the present Town Clerk of Bury, to the vacant post. Mr. Robertson, who was admitted in 1933, will commence duties on the 1st April next.